



INSOL
INTERNATIONAL



**INTRODUCTORY CERTIFICATE IN INSOLVENCY LAW AND
PRACTICE IN THE CAYMAN ISLANDS 2023**

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

Time limit: 24 hours (from 13:00 Cayman time on 23 November to 13:00 Cayman time on 24 November 2023)

EXAMINERS

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It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

Commented [BB1]: TOTAL = 87.5/100 - Excellent results - well done!

Commented [BB2R1]: Mark adjusted to 88/100

INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) Cayman time on Thursday 23 November 2023** and must be returned / submitted by **13:00 (1 pm) Cayman time on Friday 24 November 2023**. Please note that assessments returned late will not be accepted.
2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.
4. You must save this document using the following format: **studentID.SummativeAssessment**. An example would be something along the following lines: 202223-336.SummativeAssessment. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to david.burdette@insol.org.**
6. Enquiries during the time that the assessment is written must be directed to David Burdette at **david.burdette@insol.org** or by WhatsApp on +44 7545 773890 or to Brenda Bennett at **brenda.bennett@insol.org** or by WhatsApp on +27 66 228 2010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).
7. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate’s own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of**

this will forfeit the assessment and disciplinary charges will follow. When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.

8. Once a candidate's assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.
9. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.
10. If a candidate is unable to complete this summative assessment (examination), please note that a re-sit assessment will only be given if there are exceptional circumstances that prevent the candidate from completing or submitting it (such as illness). Feedback on this final assessment will be provided within four weeks of the paper having been written - please do not enquire about your marks before four weeks have elapsed. **However, please note that it is our intention to send out the results on this course by Friday 22 December 2023 at the latest.**
11. Please note that this document will probably reformat in line with the default settings of your printer or PC. Please do not be concerned if the formatting of this document changes in line with your printer or PC settings.

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Questions 1.1 - 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

Question 1.1

What is the date for Financial Institutions to submit its common reporting standard (CRS) Return in respect of reportable accounts?

- (a) 1 January (annually)
- (b) 1 April (annually)
- (c) 1 July (annually)
- (d) 1 October (annually)

Question 1.2

What is the maximum success fee permitted pursuant to Conditional fee agreements?

- (a) 50%
- (b) 33.33%
- (c) 66.66%
- (d) 100%

Question 1.3

Choose the **correct** statement:

How many forms of security interests are recognised in the Cayman Islands?

- (a) 3

Commented [BB3]: Question 1 - Sub-total = 20/20

(b) 5

(c) 6

(d) None of the above

Question 1.4

Who may **not** petition for the winding up of a Company?

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

What is the minimum sum required to be owed, to enable a statutory demand to be used?

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

Question 1.6

Choose the **correct** statement:

A Restructuring Officer is required to report to the Court following their appointment:

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

(c) At such intervals as the Restructuring Officer considers appropriate.

- (d) Within 7 days of the appointment.

Question 1.7

Which of the following is **not** required to be included in an affidavit filed in support of a restructuring petition:

- (a) A statement that, having made due enquiry and taken appropriate advice, the board believes that the company is or is likely to become unable to pay its debts.
- (b) An explanation of how the company will be funded during the restructuring period.
- (c) A statement as to why the directors believe that the appointment of a restructuring officer will be in the bests interest of the company.
- (d) A detailed outline of the proposed restructuring plan.

Question 1.8

Choose the **correct** statement:

A petition for the appointment of a Restructuring Officer can be brought by:

- (a) the company.
- (b) any creditor;
- (c) any contributory; or
- (d) all of the above

Question 1.9

Choose the **correct** statement:

Unless the Court otherwise directs, when must the petition for the appointment of a Restructuring Officer be heard?

- (a) within 14 days of the petition being filed.
- (b) within 21 days of the petition being filed.
- (c) within 28 days of the petition being filed.
- (d) within 56 days of the petition being filed.

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

- (a) can be sanctioned by the Court with the consent of all affected parties.
- (b) requires a special resolution in accordance with the company's Articles.
- (c) can only proceed if there are shareholders / creditors who may not agree with it
- (d) Only needs to be approved by a majority in value.

Question 1.11

Select the **incorrect** statement:

- (a) The Cayman Islands adopts the principle of universalism and the principle of assistance in respect of cross-border insolvency.
- (b) Foreign representatives can apply for assistance under Part XVII of the Companies Act.
- (c) The Cayman Islands has implemented the UNCITRAL Model Law on Cross-Border Insolvency.
- (d) There are no automatic rights in the Cayman Islands based on the centre of main interests of the debtor.

Question 1.12

Choose the **correct** statement:

If winding up proceedings are filed against a Cayman Islands company in the Cayman Islands and in a foreign country, which of the following statements is true?

- (a) The Cayman Islands Court will wish to ensure comity between courts in other jurisdictions so it will be deferential to whatever decision is reached by the foreign court.
- (b) The Cayman Islands Court will wish to ensure that Cayman Islands creditors have priority over foreign creditors.
- (c) The Cayman Islands Court will wish to ensure that secured creditors cannot prejudice unsecured creditors.

- (d) The Cayman Islands Court takes into account a number of factors, but the starting point is that the main insolvency proceedings for a Cayman Islands company should take place in the Cayman Islands.

Question 1.13

Select the **correct** statement:

- (a) A voluntary liquidator will automatically cease to hold office if a conflict of interest arises during the liquidation.
- (b) A voluntary liquidator will automatically cease to hold office as such upon the appointment of an official liquidator following a supervision order.
- (c) A sole voluntary liquidator can resign at any time without reference to the shareholders or the court.
- (d) A voluntary liquidator can be removed by the company's creditors.

Question 1.14

Select the **correct** statement relating to the adjudication, quantification and distribution of claims during an official liquidation:

- (a) An official liquidator acts in *quasi*-judicial capacity in respect of the adjudication of claims, meaning that the liquidator's determination will be final and is not capable of dispute.
- (b) A proof of debt is always required in order for an official liquidator to adjudicate on a creditor's claim.
- (c) Only creditors with a contractual right to interest have an entitlement to interest.
- (d) A valid contract (agreed between the company and the creditor) can have the effect of changing the otherwise statutory ranking of that creditors' claim, such that the claim is subordinated.

Question 1.15

Select the **correct** statement relating to the appointment of inspectors:

- (a) The report of an inspector can be used in any legal proceeding as evidence of the opinion of the inspectors.

- (b) Upon the appointment of an inspector the directors' powers will automatically cease.
- (c) Upon the appointment of an inspector there is a stay of proceedings such that a winding up application cannot be brought.
- (d) Only CIMA has the power to appoint an inspector.

Question 1.16

Select the **correct** statement relating to exempted limited partnerships (ELPs):

- (a) Limited Partners have an unfettered statutory right to petition the court to wind up the relevant ELP / General Partner.
- (b) Where there are inconsistencies in relation to the dissolution of ELPs, the ELP Act will take priority over the Companies Act.
- (c) An ELP is required to have more than one limited partner.
- (d) An ELP formed under the Exempted Limited Partnership has a separate legal personality.

Question 1.17

Select the **correct** statement:

Which of the following statements in relation to informal workouts pursuant to the Cayman Islands law is correct:

- (a) The restructuring officer regime is an example of an Informal workout process under Cayman Islands law.
- (b) A stay of proceedings is not available in the Cayman Islands for informal creditor workouts.
- (c) A qualified insolvency practitioner is required to oversee an informal workout under the Insolvency Practitioners Regulations.
- (d) Under Cayman Islands law, any new financing advanced during an informal creditor workout will be provided with priority status in the event the company is later liquidated.

Question 1.18

Choose the **correct** statement:

Which of the following statements is true regarding a provisional liquidation application?

- (a) The company has the statutory power to commence the proceedings.
- (b) There is a worldwide moratorium (stay) upon the presentation of the provisional liquidation application.
- (c) A winding up petition must be presented as a precursor to the application for the provisional liquidation.
- (d) Following the implementation of restructuring officer regime, a company can no longer seek the appointment of a provisional liquidator if it intends on presenting a restructuring proposal.

Question 1.19

Select the **correct** statement:

An official liquidator can set aside dispositions that seek to prefer one creditor over other creditors within how many months / years before the deemed commencement of the company's liquidation.

- (a) Three months
- (b) Six months
- (c) Six years
- (d) There is no time limit

Question 1.20

Select the **correct** statement:

Which of the following is **not a** fundamental principle of ethics for Insolvency Practitioners per the Cayman Islands Institute of Professional Accountants:

- (a) Conflicts of interest
- (b) Integrity
- (c) Confidentiality
- (d) Professional behaviour

**** END OF QUESTION 1 ****

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

Where appropriate, refer to the fact pattern below when answering the questions that follow. Please note that not all questions relate to the fact pattern.

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

Bluesea Digital Capital Limited (Bluesea) was established in 2018 in the Cayman Islands as a digital asset management platform. Bluesea operated multiple online cryptocurrency trading platforms across the Caribbean and Latin America, known as OTPs. Investments made into these OTPs were held in secure brokerage accounts under Bluesea's own name. Bluesea's clientele comprised a diverse mix of institutional investors, high-net-worth individuals, and consumers.

On 24 June 2022, one of Bluesea's prominent OTPs, eTrade Wave (eTrade), abruptly disabled its buy / sell functionality without prior notice. At the time of suspension, eTrade had amassed over 2,500 users who had collectively invested approximately \$125 million. This sudden suspension of the trading platform created widespread apprehension among investors, resulting in an overwhelming surge of withdrawal requests. Notably, Whitesand Capital (Whitesand) sought to withdraw its entire deposit of \$32 million but faced insurmountable challenges in recovering the funds.

Unable to retrieve its deposit, Whitesand initiated winding up proceedings against Bluesea in May 2023. The petition faced vehement opposition from Bluesea, which asserted that deposits had been transferred to its joint venture partner. Bluesea claimed it needed additional time to resolve a "cordial disagreement" to facilitate the return of deposits. Amid allegations that investor deposits had not been segregated as promised and due to Bluewave's inability to meet its financial obligations, the Grand Court of the Cayman Islands saw fit to make a winding up order on 22 August 2023.

Following the appointment of the official liquidator, Bluesea's joint venture partner, based in Singapore, became the subject of several press reports. These reports alleged that its director had previously been involved in a fraudulent investment scheme in the early 2000s. Furthermore, the official liquidator had discovered that only one audit had ever been conducted in respect of Bluesea's financial statements, with Bluesea's auditors resigning shortly thereafter.

The official liquidators have called for creditor claims, and among the submissions received, a claim amounting to \$0.5 million has surfaced, relating to leasing obligations tied to office space that was utilised by the joint venture partner. Bluesea's documented records fail to substantiate any historical evidence of rental payments being disbursed by the company, nor do they reveal any corresponding liabilities recorded within its financial statements.

Question 2.1

As part of Whitesand's petition to wind up Bluesea, Whitesand obtained sworn consent(s) to act from the proposed official liquidators. Set out the required content of the consent to act signed by the proposed official liquidator(s). (5)

The consents to act for resident OLs need to contain the information stipulated in CWR O.3, r. 4(1) of the CWR, being: (1)

- that proposed OL is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5; (1)
- having made due enquiry, the proposed person believes that person and that person's firm meet the independence requirement contained in Regulation 6; (1)
- the proposed and/or that person's firm are in compliance with the insurance requirement contained in Regulation 7; and (1)
- that person is willing to act as official liquidator if so appointed by the Court. (1)

For completeness, in the event a foreign practitioner is sought to be nominated alongside the resident OL, then his/her consent to act needs to contain the information specified by CWR O.3, r. 4(2), being

- that person's professional qualifications;
- the country in which that person is qualified to perform functions equivalent to those performed by official liquidators under the Law or by trustees under the Bankruptcy Act (as amended and revised);
- that person's professional experience;
- that person will have the benefit of professional indemnity insurance in respect of that person's acts and omissions done in that person's capacity as an official liquidator of the company meeting the requirements of Regulation 7;
- if that person has been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the company or a related party of the company, full particulars of such appointment; and that person's professional qualifications;
- that, having made due enquiry, that person and that person's firm meet independence requirement contained in Regulation 6.

5 marks

Question 2.2

The proposed liquidators are employees of the accountancy practice Bodden & Ebanks Limited. Shortly prior to the hearing of the winding up petition of Bluesea, it transpires that Bodden & Ebanks Limited previously acted as auditors of Bluesea in 2021. Are the proposed liquidators still able to act in relation to Bluesea? Please provide an explanation for your answer. This information came to light after the proposed liquidators had already provided their consents to act; what should the proposed liquidators do in respect of the same? (5)

Commented [BB4]: Question 2.1 - Sub-total = 5/5

Commented [jo5]: Be careful on stuff like this, whilst we know what regulations you're referring to had this been marked by an independent marker they may not have given points for not saying or defining the regulations you're talking about

Commented [BB6]: Question 2.2 - Sub-total = 5/5

The proposed OLs are not able to act. (1)

Under Regulation 6 (1) of the Insolvency Practitioners Regulations, an IP cannot be appointed as an OL unless that person can be properly independent. An IP will not be regarded as independent if person or the firm of which that person is an employee, has acted as an auditor of the company within a period of three years (1) immediately preceding the commencement of the liquidation.

Since Bodden & Ebanks Limited acted as the auditors of Bluesea within that three-year window in 2021, the proposed OLs do not meet the independence requirement under Regulation 6. (1)

As they are not eligible to act as OLs, they should recuse themselves from acting and file a supplementary affidavit updating the Court on the same. (1)

5 marks

Question 2.3

Tom and Jerry have been appointed as joint voluntary liquidators of Cheese Limited, a Cayman Islands exempted company, upon the passing of a special resolution of the shareholders of Cheese Limited, dated 1 March 2023.

On 1 April, Tom decides to retire from his career as voluntary liquidator and leave his firm, leaving Jerry to act as sole voluntary liquidator.

On 1 June, one of the shareholders reads that Jerry has been named in an Offshore Alert article suggesting that he has been defrauding companies in liquidation. They wish to remove him as liquidator immediately, but do not have the support of the other shareholders to take that action.

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

List the qualifications Tom and Jerry need to act as voluntary liquidators. (1)

There are no qualification requirements to be appointed as a voluntary liquidator. (1)

Question 2.3.2 (2/2 marks)

List the statutory steps Tom and Jerry must take within 28 days of their appointment, as set out in the Companies Act. (2)

Under s 123 of the Companies Act, Tom and Jerry must, within 28 days of their

Commented [BB7]: Question 2.3 - Sub-total = 5/5

appointment:

1. file a notice of the winding up with the Registrar;
2. file their consents to act with the Registrar;
3. file the directors' declarations of solvency with the Registrar;
4. serve the notice of the winding up upon the Cayman Islands Monetary Authority (the Authority) in the event Cheese Ltd is carrying on a regulated business,
5. publish the notice of the winding up in the Gazette (2)

Question 2.3.3 (2/2 marks)

Describe the basis upon which the company may resolve to remunerate Tom and Jerry in their capacity as the voluntary liquidators. (2)

Per CWR O.13, r.9(2) Cheese Limited may resolve to remunerate Tom and Jerry on the basis of:

- an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation;
- a fixed sum;
- a commission or percentage of the assets distributed or realised; or
- combination of the above methods (2)

Question 2.4 (0.5/2 marks)

Assuming that the contributories petition the Grand Court of the Cayman Islands for an appointment of a provisional liquidator, what are the Court's powers upon the hearing of a winding-up petition? (2)

If the Court is satisfied that the conditions under s 104(2) are met, then the Court may appoint a provisional liquidator.

The Court maintains a general discretion to "*grant the provisional liquidators such powers as the Court considers necessary and appropriate to prevent such dissipation, misuse, mismanagement and misconduct and to ensure the Company's assets are properly protected pending the hearing of the winding up petition*"; see Natural Dairy (NZ) Holdings (unreported, 7 June 2017) at para 5.

The PL is only permitted to carry out the functions conferred by the Court: s 104(4). The powers of the provisional liquidator must be expressly granted by the terms of the appointment order and will be tailored to meet the specific needs of Cheese Limited

Question 2.5

Commented [BB8]: Question 2.4 - Sub-total = 0.5/2

Commented [ni9]: this question asks what the Court's powers are 'upon the hearing of a **winding up petition**' not upon the hearing of a PL application. Therefore you have not answered the question correctly I'm afraid. I am giving you 0.5 marks for what would have been a correct answer to the question "what would have been the court's powers upon the hearing of a PL application?"

Commented [BB10]: Question 2.5 - Sub-total = 8/9

Question 2.5.1 (4/4 marks)

In a brief essay, explain who can apply to the Court to remove official liquidators, and in what circumstances. Who must such an application be served on? **(4)**

The applicant must have a positive financial interest in the liquidation: see *Johnson v Deloitte Touche*. Accordingly, creditors are the only proper persons to make an application for removal in the case of an insolvent liquidation while contributories are the only proper persons to make an application for removal in the case of a solvent liquidation. This is reflected by section 107 of the Companies Act, which provides that "An official liquidator may be removed from office by order of the Court made on the application of a creditor or contributory of the company".

A court may exercise its broad discretion to remove an OL if it considers the removal to be for the general advantage of the majority of the persons interested in the liquidation. Good reasons must be shown for the removal of the OL, for example, if the OL has a conflict of interest, if the OL pursues litigation against the wishes of a creditor, impropriety or misconduct, or fails to investigate matters such as misfeasance by former directors. A creditor's preference for an alternative liquidator, or being disgruntled, are generally not sufficient reasons to justify the removal of an OL.

The removal summons must be served on the OL with at least 14 days' notice, each member of the liquidation committee, counsel for the liquidation committee (if applicable), and any other creditors or contributories as directed by the Court: see CWR O.5, r 6 (2).

Question 2.5.2 (4/5 marks)

Briefly explain why it makes sense that the class of potential applicant varies in accordance with the solvency of the company.

(5)

Shareholders rank behind creditors and other parties to whom the company owes money in the event of an insolvency.

In the case of an insolvent liquidation, there are no surplus assets available for distribution to shareholders. Only the creditors have an interest in the liquidation estate and should have a say in the conduct of the liquidation, including in respect of the removal of liquidators.

Conversely, in the case of a solvent liquidation, there are surplus assets following the payment of creditors. The interested party in the distribution are the contributories (because the creditors will be paid in full regardless of the conduct of the liquidation). Therefore it makes sense for the contributories, the class of applicant with the financial

Commented [ni11]: great answer

Commented [ni12]: Good answer. The 5th mark was reserved for those answers that mentioned *BTU Power Company* (which is cited in the course notes under section 4.2.6.2 removal).

interest in the liquidation, to have a say in the conduct of the liquidation including in respect of the removal of liquidators.

Question 2.6

During a liquidation there is an expected recovery into the liquidation estate. The amount is such that the liquidation estate is no longer deemed to be insolvent and the official liquidator can settle all of the outstanding creditor claims (including interest) in full. The official liquidator has subsequently filed a revised certificate of solvency (CWR Form No 14) with the court. What impact will the change in solvency have on the liquidation committee, assuming one has been constituted? (4)

Commented [ca13]: Question 2.6 Subtotal
4/4 marks

Under CWR O.9, r.3. the OL will be required to reconstitute the liquidation committee. The creditor members of the liquidation committee will automatically cease to be members. The OL will be required to reconvene a meeting of contributories for the purpose of electing new members from amongst the company's contributories. The reconstituted liquidation committee will be required to have between 3 to five contributories to be elected at the first meeting of contributories (Order 9, r 1)

Question 2.7

Discuss the steps that a liquidator will need to take following the making of an order for dissolution. (5)

Commented [ca14]: Question 2.7 Subtotal
5/5 marks

Upon the making of an order dissolving a company, the official liquidator's duties as officeholder cease save for any residual duties preserved by the order for dissolution, including for the preservation, storage and destruction of the company's remaining books and records, and dealings with unclaimed dividends.

Following the making of an order for dissolution, the OL will need to file the order for dissolution with the registrar within 14 days from the date upon which the order is perfected.

The OL will also need to comply with the supplementary directions in the order for dissolution providing for:

- the retention of the whole or part of the liquidation file for longer than the statutory minimum of three years; and
- the retention, storage and destruction of the company's books and records.

If there are unclaimed dividends or undistributed assets, then the OL will be required to, for a period of one year:

- establish a trust account for the receipt of any unclaimed dividends or uncleared dividend cheques;
- transfer title of any undistributed assets to the OL to be held on trust for the benefit of the creditors/contributories;

- pay out of the trust account/transfer the assets to the beneficiaries once they are located and believed to be entitled to the funds / assets; and
- pay the former OL's trustee fees and expenses.

Following that one-year period, the former OL will need to transfer any remaining money or assets to the Financial Secretary.

Question 2.8

Describe the general investigative powers and duties of a liquidator. (5)

The core function of a liquidation is to:

- to collect, realise, and distribute the assets of the company to its creditors and, if there is a surplus, to those entitled to such surplus; and
- to report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.

Under the Act, the official liquidator is granted broad investigative powers to assist with this dual recovery and reporting function.

Under s 102 of the Act, an OL is empowered to investigate (1) the cause of the failure of the company (if applicable); and (2) the promotion, business, dealings, and affairs of the Company. (1)

In addition, an OL may also:

- require relevant individuals, including past and present directors, past and present professional services providers, and recent employees, to furnish statements as to the affairs of the company: s 102 of the Companies Act. The statement of affairs must be verified by way of a properly executed affidavit no later than 21 clear days following the request and should include the information set out at s 101(2) of the Act. (1)
- Seek permission from the Court to (a) assist the Authority or Royal Cayman Islands Police Service to investigate the conduct of certain directors, officers, professional service providers, and recent employees of the company and (b) institute and conduct a criminal prosecution of those same persons; (1)
- Apply for a court order for the examination of any relevant person; or that person deliver up to the liquidator property or documents belonging to the Company: s 103(3). (1)

A reference to case law would substantiate your answer and given you full marks. See below:

A liquidator is an officer of the court with certain general duties which were summarised in the Cayman Islands case *In the Matter of Citrico International Limited* [2004-05 CILR 435] (citing *Gooch's Case* 1872, 7 Ch App 207), (1 mark) as requiring the liquidator "to make

Commented [BB15]: Question 2.8 - Sub-total = 4/5

himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the courts of his investigation, which is material to ascertain the exact truth in every case before the Court". (1 mark)

Question 2.9

Explain what is meant by the "relevant date" for the purposes of a section 101 of the Companies Act (2023 Revision) notice served by a liquidator in order to procure a statement of affairs from persons listed in section 101(3). (5)

Relevant date for the purposes of s 101 means either:

- (1) the date of the provisional liquidator's appointment (in the case where a provisional liquidator is appointed); or
- (2) in any other case, the commencement of the winding up. (1)

The relevant date in respect of (1) is obvious. As to (2), the commencement of a winding up occurs either:

- at the time of passing of a resolution by the company for voluntary winding up; (½)
- at the expiry of any period fixed for the duration of a company by its articles of association; (½)
- at the date of an event upon the occurrence of which it is provided by its articles of association that the company is to be wound up; or (½)
- at the date of the presentation of the petition to appoint the restructuring officer, in the event if a restructuring officer has been appointed but has not been discharged; or (½)
- at the time of the presentation of the petition for winding up (1) in the event none of the above apply: see s 100(2) of the Companies Act. (1)

**** END OF QUESTION 2 ****

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

Commented [BB16]: Question 2.9 - Sub-total = 5/5

QUESTION 3 - CORPORATE RESCUE (20 MARKS)

Where appropriate, refer to the fact pattern below when answering the questions that follow.

FACT PATTERN

SMB TECH CORPORATION

SMB Tech Corporation (SMB Tech), a Cayman Islands-based company operating in the technology sector, boasts a global presence with subsidiaries spanning various jurisdictions, including the United States, the United Kingdom, and Hong Kong. However, SMB has recently encountered significant financial challenges stemming from an economic downturn and heightened competition within its industry. Considering these difficulties, SMB sought the advice of a reputable advisory firm, which cautioned that SMB Tech teetered on the brink of insolvency and urgently required a financial restructuring.

While exploring its strategic alternatives, SMB Tech found itself confronting mounting pressure from its creditors. One particularly assertive creditor, Tech Credit Systems (TCS), threatened to initiate winding-up proceedings against SMB Tech. In a bid to secure some respite, SMB Tech entered into a three-month standstill agreement with TCS. However, as the three-month period lapsed without concrete restructuring proposals in place, TCS exhibited signs of growing impatience.

The delay and indecision on the part of SMB Tech's management have further exacerbated tensions among certain contributories of the company. These contributories, expressing their dissatisfaction, have indicated an intent to petition the Grand Court of the Cayman Islands for the appointment of a provisional liquidator. Their chosen provisional liquidator is based in Hong Kong, and their motivation is grounded in a perceived loss of trust and confidence in SMB's directors.

SMB Tech's financial obligations include unsecured debt governed by English law, amounting to GBP 6 million, owed to three creditors situated in the United Kingdom. The company hopes to negotiate a compromise on these liabilities as part of its restructuring efforts. Additionally, SMB Tech has undertaken guarantees for certain financial obligations of several subsidiaries. Notably, the creditors holding these guarantee liabilities have indicated a reluctance to endorse any proposed restructuring scheme.

Question 3.1

The chosen provisional liquidator by the contributories of SMB has professional indemnity insurance up to a limit of US\$5 million in respect of each and every claim. The chosen provisional liquidator is unwilling to increase his professional indemnity liability insurance limit due to the increasing cost of insurance products in the market. Along with your

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reasons, provide an explanation as to whether the chosen provisional liquidator could be appointed by the Grand Court of the Cayman Islands. (5)

Pursuant to Regulation 7 of the Insolvency Practitioner Regulations, a qualified IP shall not be appointed as an official liquidator of any company unless he and the firm of which he is a partner or employee or the company of which he is an employee, has professional indemnity insurance (up to a limit of at least US\$10 million in respect of each and every claim and at least US\$20 million in the aggregate, with a deductible of not more than US\$100,000) applicable to the negligent performance or non-performance of his duties as an official liquidator generally. (1)

Regulation 7 applies to the appointment of provisional liquidators because:

- An official liquidator under s 89(1) of the Companies Act is defined to include a provisional liquidator.
- The definitions expressed under s 89(1) the Companies Act are adopted by the Insolvency Practitioner Regulations by virtue of Regulation 3

As the professional indemnity insurance held by the chosen PL of US\$5million falls below the US\$10million threshold, the chosen PL cannot be appointed by as a PL by the Grand Court (1)

3 marks - extra marks would have been awarded for highlighting this was a foreign practitioner, and then tying Regulation 8 of the IPRs to the answer, which is then what pulls in the applicability of Regulation 7 to foreign practitioners.

Question 3.2

What must the company demonstrate to the Court before the Court will appoint a restructuring officer? (2)

A company must demonstrate that: (1) it is likely to become unable to pay its debts as they fall due, (1) and (ii) the company intends to present a compromise or arrangement with its creditors: s 91B(1). (1)

In respect of (1), the legal test for solvency is on a cash flow basis. It permits a consideration of debts that that would become due in the reasonably near future: see *Weaving Macro Fixed Income Fund Limited*.

As to (2), it is not necessary for the company to have a formulated plan. However, the company would need to establish:

- The refinancing and / or sale of the company as a going concern is likely to be more beneficial to the creditors than a liquidation realisation of the company's assets;
- There is a real prospect of a refinancing and / or sale as a going concern being affected for the benefit of the general body of the creditors; and

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- In the circumstances, it is in the best interest of the creditors to try to achieve such a refinancing and / or sale as a going concern: see *In the matter of Fruit of Loom Ltd*, applied in *Re Oriente Ltd*

2 marks

Question 3.3

What are the advertising requirements for a restructuring petition? (2)

Once the restructuring petition is presented, it is required to be advertised in accordance with CWR Form 3A: (1) once in a newspaper having circulation in the Cayman Islands (½) (2) once in a newspaper having circulation in a country (or countries) in which the petition is most likely to come to the attention of the company's creditors (½) and contributories: CWR O 1A, r 1(3)-(4). In this case, the petition would also need to be advertised in the UK, Hong Kong and potentially the US.

The advertisements must appear no more than more than seven business days after the filing of a Restructuring Petition (½) and not less than seven business days before the hearing date: (½) CWR O 1A, r 1(6)

Question 3.4

Describe at least six (6) elements of the new restructuring officer regime that assist in safeguarding the interests of creditors. (6)

The advertising requirements noted above ensure that the application is brought to the attention of all relevant stakeholders, be they within or outside of the jurisdiction.

A creditor may appear to be heard on the hearing of a RO petition: (1)

- to support or oppose the appointment of a restructuring officer) (O.1A, r.3).
- nominate alternative restructuring officers to those proposed by the Company (O.1A, R.3)

If a creditor is dissatisfied with the appointment of RO or the progress of the RO, he/she may:

- apply to the Court for a variation or a discharge of an order appointing the restructuring officers by way of summons in Form Number 16B of the CWR: s 91E (1)
- apply to the Court for the removal and replacement of a restructuring officer by way of summons in Form Number 16C of the CWR: s 91F (1)
- seek leave to may present a winding up petition: s 91G

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Creditors with security over the whole or part of the assets of the company will remain entitled to enforce that security without the leave of the Court and without reference to the restructuring officer: s 91H. (1)

4 marks - other suggested answers below

- The default position is that a Restructuring Petition will be heard on notice to stakeholders (while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made *ex parte* by default). (1 mark)
- The same advertising requirements are imposed as applicable to a winding up petition (the prior regime did not require advertisement of an application to appoint RPLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (1 mark)
- A requirement for the ROs to report - open and transparent process (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)

Question 3.5

Outline the relief **that is and is not** available to the Court upon a restructuring petition. (5)

Under 91B, a Court may, on hearing a RO petition:

1. make an order appointing a restructuring officer; (1)
2. adjourn the hearing conditionally or unconditionally; (1)
3. dismiss the petition; or (1)
4. make any other order as the Court thinks fit. (1)

A court is not able to make an order except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

4 marks

**** END OF QUESTION 3 ****

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

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QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

The questions below deal with exempted limited partnerships (ELP's), cross-border insolvency, the recognition of foreign judgments and consumer insolvency.

Question 4.1

In addition to the Limited Partnership Agreement, what governs the operation of ELPs? (3)

The operation of ELPs is also governed by: (1) the Partnership Act (2013 Revision); (1) (2) the Exempted Limited Partnership Act (2021 Revision); (1) and (3) the principles of common law and equity as applicable to partnerships. (1)

In addition, Part V of the Companies Act and the CWR apply in respect of the winding up and dissolution of ELPs (with the appropriate modification).

Question 4.2

When does the Cayman Islands court have jurisdiction to wind up a foreign company? (5)

A Cayman Court has jurisdiction to wind up a foreign company that:

- has property located in the Cayman Islands;
- is carrying on business in the Cayman Islands;
- is the general partner of an ordinary limited partnership or an ELP; or
- is registered under Part IX of the Companies Act. Under Part XI, a foreign company is required to register in the Cayman Islands (i) if it establishes a place of business, or (2) commences carrying on business within the Cayman Islands.

Question 4.3

Does a judgment of a foreign court need to be registered and / or enforced within the Cayman Islands before it is relied upon as the basis for seeking a winding up order? Provide reasons. (3)

Yes, a foreign judgment has no direct legal effect. This is because the Cayman Islands has not entered into any international treaties for reciprocal recognition or enforcement of foreign judgments, nor is it a signatory to the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Presently, only judgments from Australia (and its external territories) as set out in the Foreign Judgments Reciprocal Enforcement (Australia and its External Territories Order) 1993 may be registered and enforce within the same manner as a domestic judgment: see the Foreign Judgments Reciprocal Enforcement Act (1996 Revision).

As to the balance of the foreign judgments, they can be enforced under common law by

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way of commencing a new action in the Cayman Islands on the basis that the foreign judgment is a debt or other obligation.

Refer to Kawaley J's first-instance judgment in *In the matter of Guoan International Limited* (unreported, 29 October 2021) which confirms that a creditor may rely upon a foreign judgment as the basis for seeking a winding up order without first obtaining recognition and / or enforcement orders in respect of such foreign judgment from the Cayman Islands Court

Question 4.4

State the main statutory powers and duties of the trustee in bankruptcy, and provide at least one example with reference to a section of the Bankruptcy Act. (4)

The main statutory powers and duties of the trustee in bankruptcy are: (1) to preserve the property (1) such that it may be returned to the debtor in the event the provisional order is revoked until the provisional order is made absolute; (2) carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the business; section 79 (1) (3) bring or defend any legal proceedings relating to the property of the debtor; (4) receive and adjudicate the proof of debts, which must be filled in the manner set out in the Grand Court (Bankruptcy) Rules 2021; (1) (5) administer the debtor's estate for the benefit of the creditors once an absolute order has been made.

For full marks one of your examples must contain the reference to the section of the Bankruptcy Act ie Until the provisional order is made absolute, it is the duty of the Trustee to preserve the property such that it may be returned to the debtor in the event the provisional order is revoked (section 38 of the Act).

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****

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